

**VIRGINIA CODE COMMISSION**

*Wednesday, June 23, 2010 – 10:00 a.m.  
General Assembly Building, 6th Floor  
Speaker's Conference Room  
Richmond, Virginia 23219*

**MEMBERS PRESENT:** John S. Edwards; Bill Janis; Jim LeMunyon; Jane M. Roush; James F. Almand; Robert L. Calhoun; Thomas M. Moncure, Jr.; E.M. Miller, Jr.

**MEMBERS ABSENT:** Ryan McDougale

**OTHERS PRESENT:** Brian Kennedy, LexisNexis; Jeannine Rose, Department of Planning and Budget; Chris Nolen, Chair, Administrative Law Advisory Committee

**STAFF PRESENT:** David Cotter, Elizabeth Palen, Lilli Hausenfluck, Karen Perrine, Jane Chaffin

**Call to Order and New Member Welcome**

Senator Edwards called the meeting to order at 10:10 a.m. and welcomed new member Delegate Jim LeMunyon. The Speaker appointed Delegate LeMunyon to fill the vacancy left by Delegate Landes.

**Election of Chair and Vice Chair**

Senator Edwards turned the chair over to Mr. Miller to explain election procedures and conduct the election of chairman. At the suggestion of Mr. Moncure, the election was deferred until Delegate Janis' arrival.

**Approval of Minutes**

Senator Calhoun made a motion, seconded by Judge Almand, to approve the minutes of the December 3, 2009, and January 21, 2010 meetings. The motion was approved.

**Legislative Session Update**

Staff provided the membership with an overview of the legislation recommended by the Virginia Code Commission that was adopted by the 2010 Session of the General Assembly:

- Obsolete laws: Chapters 65, 91, and 92 (effective July 1) repeal or clean up obsolete provisions in the Code of Virginia.
- Recodification: Chapter 794 (effective October 1) recodifies the banking and finance laws in Title 6.1 to Title 6.2. The legislation becomes effective October 1, 2010, and the Code of Virginia replacement volume containing newly enacted Title 6.2 will be shipped in September. Chapter 665 (effective July 1), which broadens the definition of "principal" for the purposes of the Mortgage Lender and Broker Act also came out of the Title 6.1 recodification study.
- Code Commission: Chapter 413 (effective July 1) expands the membership of the Code Commission by an additional one or two nonlegislative citizen members, as may be recommended by the Commission, who have demonstrated legal knowledge and experience in the codification of session laws and recodification of statutes. Upon recommendation of the Commission, the Speaker of the House of Delegates makes the first appointment and the Senate Committee on Rules the second.

- Electronic certification of regulations. Chapter 407 (effective July 1) allows electronic certification of final regulations in lieu of a physical signature.

### **Code Commission Member Appointment**

Pursuant to Chapter 413 of the 2010 Acts of Assembly, which provides for the appointment of up to two additional Code Commission members, the Commission voted unanimously to make a recommendation to the Speaker to appoint Frank Ferguson to the Commission as the 11th member of the Commission. Mr. Ferguson has served on the Commission since 1994 as the Attorney General designee, but recently retired. Under the new appointment, he will serve in the capacity of nonlegislative citizen member.

### **Administrative Law Advisory Committee**

Chris Nolen, Chairman of the Administrative Law Advisory Committee (ALAC), presented the proposed 2010 ALAC work plan to the Commission for approval:

- Suspension of Regulations: Senate Bill 442 (Wagner, 2010) was precipitated by controversy surrounding the Stormwater Management Regulations. SB 442 broadened the scope of when a regulation may be suspended to include suspension after the regulation has become effective. Although the legislation failed to pass, ALAC proposes to consider issues related to suspension of regulations, including (i) separation of powers; (ii) timetables; and (iii) notice provisions, as these issues have not been reviewed in over 10 years.

Senator Edwards noted that Senate Bill 442 was killed in the Senate Committee on Rules because it was determined to be unconstitutional. Mr. Nolen responded that ALAC is interested in evaluating other states' suspension processes.

- Volkswagen of America v. Smit, Commissioner of DMV: In this case issued February 25, 2010, the Supreme Court of Virginia held that § 46.2-1569(7) of the Code of Virginia, as applied by the Commissioner of the Department of Motor Vehicles, was impermissibly vague in that neither the statute nor any formal or informal administrative action adequately prescribed what conduct was prohibited. Justice Koontz wrote "In short, the requirement of fair notice contained in due process is not satisfied if the public cannot determine what the law prohibits or the standard to which they must conform from either the language of the statute or a properly promulgated regulation or other official guidance provided prior to the statute being enforced..." In this case, DMV had neither promulgated regulations nor adopted a guidance document regarding the "equitable distribution" requirement of § 46.2-1569(7). The court's opinion indicates that a statute, which is constitutionally defective due to impermissible vagueness, could be cured by a regulation or other form of guidance that sets forth a clearly enunciated standard.

ALAC proposes to consider (i) absent an agency promulgating a regulation, can the law be overturned as vague as applied to a person and (ii) what role should ALAC play in notifying agencies?

- Small Business Impact: ALAC proposes to review the application of § 2.2-4007.1 D relating to the requirement that agencies review existing regulations to determine whether they should be continued without change or be amended or repealed to minimize the economic impact of regulations on small businesses. ALAC's goal is to streamline the process for consistency

among agencies. Issues to be addressed include the review process, certification, and publication.

- Virginia Supreme Court Rule 2A:2. Notice of Appeal: Senator Edwards asked Mr. Nolen to add another issue to ALAC's work plan. Supreme Court Rule 2A:2 requires the filing of a notice of appeal with the agency within 30 days of adoption of a regulation or service of a final order in a case decision. The notice must identify the regulation or case decision appealed from and state the following: names and addresses of the appellant, other parties and their counsel, if any; the circuit court to which the appeal is taken. Then, under Rule 2A:4, within 30 days of filing the notice, the appellant must file a petition for appeal with the circuit court. The petition for appeal must designate the regulation or case decision appealed from, specify the errors assigned, state the reasons why the regulation or case decision is deemed to be unlawful and conclude with a specific statement of the relief requested. Senator Edwards questions why this two step process is needed. Also, state agencies may be interpreting the rule differently, and Senator Edwards suggests ALAC should also examine the feasibility of standardizing practices.

Mr. Miller made a motion, seconded by Judge Almand to approve the work plan as with the addition of Senator Edwards' request to review Supreme Court Rule 2A:2 relating to timeframes for filing a notice of appeal. The motion carried.

### **Virginia Administrative Code**

- Price Increase: The Commission approved a 5.9% price increase request from West (Thomson-Reuters) for the Virginia Administrative Code printed supplements and volumes. From January 2008 to January 2009, the Producer Price Index Industry Data for Book Publishers -- Technical, Scientific, and Professional Book Publishing increased by 5.9%. West did not request a price increase in 2009.
- Replacement Volumes: The Commission approved staff's recommendation to replace the three Health volumes consisting of Volumes 10, 11, and 12. A fourth volume is contingently approved if the page count warrants an additional volume.

### **2010 Code of Virginia Supplements**

Brian Kennedy reported that the incorporation of the 2010 legislation into the Code of Virginia supplements is complete. The supplements are in the process of being mailed out. The Code of Virginia database on the General Assembly's website is expected to be publicly available by July 1. Four replacement volumes, as previously approved by the Commission, will be issued as follows: Volume 3B (Courts) with supplements and index, June/July 2010; Volume 7 (Motor Vehicles) and Compacts, July 2010; Volume 1B (Alcoholic Beverages to Boundaries), which contains new Title 6.2, September 2010.

### **Revision of Title 64.1, Wills and Decedents' Estates**

David Cotter reported on the revision of Title 64.1, Wills and Decedents' Estates. He stated that, in addition to Title 64.1, proposed Title 64.2 will consist of Titles 26 and 31 and part of Title 55. Mr. Cotter pointed out that the Uniform Power of Attorney Act has been added to the proposed outline.

The Code Commission discussed proposed Chapters 1 (Descent and Distribution) and 2 (Rights of Married Persons) of Title 64.2. Proposed Chapter 1 consists of existing Chapter 1 (part) of Title 64.1, and proposed Chapter 2 consists of existing Chapters 1 (part), 2, 6, and 9 of Title 64.1.

Specific issues addressed by the Commission include:

- §§ 64.2-104 and 64.2-105 - Paternity judgment language will be run by members of the Virginia Bar Association's Family Law Coalition to ensure that proper terminology is employed.
- § 64.2-114 3 d, line 104 - On behalf of the work group, Mr. Cotter asked whether the language in those sections should be tied to the federal IRS gift tax exclusion, which is \$13,000. The Commission concluded that such a change should not be made as part of the revision.
- § 64.2-117, line 229 - Mr. Cotter pointed to confusing language in subsection B relating to desertion or abandonment of a child until death of child and the right of parents to intestate succession. After thorough discussion and a determination that the language beginning with "unless" on line 229 through the end of the sentence is unnecessary, Delegate Janis made a motion, seconded by Senator Calhoun, to remove the language "unless the parent resumes the parental relationship and duties and such parental relationship and duties continue until the death of the child." Further discussion ensued about the definition of "child" and that reconciliation prior to death makes the statute inapplicable. The motion carried.
- § 64.2-121, line 331 - Senator Calhoun questioned whether the provisions dealing with the amount of the family allowance should be moved to § 64.2-118 and asked Mr. Cotter to take the issue back to the work group for resolution.
- 64.2-122, line 348 - Where the work group proposed to address an interpretation question by striking commas surrounding "or the clerk's office thereof," the Commission approved a motion to retain the commas.

The Commission will continue with its review of this title at the next meeting.

### **Return to Agenda Item #2, Election of Chair and Vice Chair**

After Delegate Janis arrived, the Commission returned to agenda item #2, election of chair and vice chair. After a brief discussion, the slate of Senator John Edwards as chair and Delegate Bill Janis as vice chair was moved and seconded. The motion carried.

### **Other Business; Public Comment; Adjourn**

The Commission adopted its meeting schedule for the remainder of the year.

The chair opened the floor for public comment. As there was no public comment and no further business to be discussed, the meeting adjourned at 12:30 p.m.